IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

Upon Appeal from the United States District Court
for the District of Idaho, Northern Division

ANDREW WEST, *Appellant,* vs. EDWARD RUTLEDGE TIMBER COMPANY, a corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Respondents.*	NO. 2416

OPENING BRIEF OF APPELLANT

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STATEMENT

Appellant brought this action on the equity side of the Court, seeking to have the respondent, the Edward Rutledge Timber Company, declared a trustee of the legal title to a certain quarter section of land in what is known as the Marble Creek Country, in Shoshone County, State of Idaho, and more particularly described in the pleadings.

The facts as admitted on the trial and proven are that on March 2, 1899, Congress passed an Act granting to the Northern Pacific Railroad Company the right to relinquish all of its lands in what is known as the Mount Rainier National Park, and to select in lieu thereof other lands in the manner set forth in the Act, which will be hereafter quoted.

On June 21, 1901, the Northern Pacific Railway Company filed in the General Land Office at Washington, D. C., its lieu selection list No. 61, which contained the following description, namely: "Lands, which when surveyed, will be all of Section 20, Township 44, North Range 3, E. B. M." (The lands in controversy being the Southeast Quarter of said section), which said selection list No. 61 purported to select these lands pursuant to the Act of March 2, 1899, in lieu of certain lands relinquished by the Railroad Company in the said Mount Rainier National Park. No record was made of this in the Local Land Office, nor was any information available in said office that said lieu list No. 61 had

been filed with the Commissioner of the General Land Office.

On May 15th, 1903, Appellant, Andrew West, first visited the lands in controversy which were then unsurveyed. He found them occupied by one John Hanson, who had constructed a cabin upon the lands, cleared one-half acre of land, and had blazed the lines around his claim, and had posted a notice on each corner thereof and one on the door of his cabin, which notice was to the effect that John Hanson had settled upon the lands, claimed them as his home, and intended to enter the same under the homestead laws as soon as the said lands should be surveyed and thrown open to entry. Said John Hanson was at that time, however, in very poor health, and it was necessary for him to go away to procure medical treatment, and appellant West thereupon purchased from John Hanson his right of possession and the improvements upon the said land. Appellant immediately went into possession, and thereafter continuously resided upon and remained in possession of said lands, improved and cultivated the same, in a substantial way, to the present time, and he is now in possession thereof.

At the time of the settlement by Appellant West, the South line of Township 45, Range 3, E. B. M., which is the North line of Township 44, Range 3, E. B. M., had already been surveyed, having been surveyed April 22nd, to April 24th, 1901.

Township 44, Range 3, E. B. M., including the lands in suit was surveyed, and the official plat of survey was filed in the Local Land Office on July 17th, 1905, and the lands

were then first open for entry under the homestead laws of the United States.

Immediately thereafter, and on the same day, Appellant West made application to enter the lands in question under the homestead laws of the United States, which application was rejected because of its supposed conflict with lieu selection list No. 61 filed by the Respondent Railway Company on June 21, 1901. From the order rejecting this application, appellant West appealed to the Commissioner of the General Land Office. The Commissioner affirmed the order rejecting his application, and appellant West appealed to the Honorable Secretary of the Interior, who sustained the Commissioner.

On July 31st, 1905, the Railway Company filed its second lieu selection list No. 61, in which list the lands in controversy were described as follows: "The Southeast Quarter of Section 20, Township 44, North Range 3, E. B. M." Thereafter, on October 10th, 1910, patent to said lands was issued to the respondent, Railway Company.

Respondent Railway Company conveyed the lands in controversy to the respondent Timber Company on the 11th day of February, 1911.

For the sake of brevity we will refer only to the facts which are necessarily involved in the questions to be presented on this appeal.

The learned trial Court found all of the facts in favor of the Appellant, but concluded that the description used

by the Northern Pacific Railway Company in its first lieu selection list No. 61, described the lands "in such manner as to designate the same with a reasonable degree of certainty," * * * That the Northern Pacific Railway Company was the lawful successor in interest of the Northern Pacific Railroad Company, and was entitled to select the lands under the terms of the Act of March 2, 1899; that the lands in question were at the date of the filing of the first selection list No. 61, "non-mineral public lands, so classified as non-mineral at the time of actual Government survey, which has been or shall be made," etc., and that the recitation in the patent of the United States issued to the Railway Company, that the said Railway Company was "the lawful successor in interest of the Railroad Company" was binding and conclusive upon the parties to this cause, and dismissed the bill as without equity. Further facts pertaining to the points raised on this appeal will be presented in the argument.

The Court found all of the issues in favor of the Appellant with the exception of the points upon which we have assigned error, and these matters we will treat in the order of their assignment.

ARGUMENT

THE DESCRIPTION CONTAINED IN THE ORIGINAL SELECTION LIST WAS NOT SUFFICIENT TO DESCRIBE ANY PARTICULAR LAND OR IMPART ANY NOTICE.

The provisions of the Act of March 2, 1899, which define

the rights and prescribe the duties of the Northern Pacific Railroad Company in making lieu selections under said Act, are found in Section 4 of the same, which is as follows:

> "Sec. 4. That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected, and the payment of the fees prescribed by law in analogous case, and the approval of the Secretary of the Interior he shall cause to be executed, in due form of law, and deliver to said company, a patent of the United States conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the Company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity."

Vol. 30, U. S. Statute at Large, p. 994.

A proper construction of this act as applied to the parties to this controversy requires us to take into consideration the circumstances surrounding the parties at the time of the initiation of their respective claims, the condition of the lands sought to be claimed and the statutes under which each were claiming.

Subsequent to the passage of the Act of March 2, 1899, and on June 6, 1900, Congress passed another Act defining the rights of the settler upon the unsurveyed public domain of the United States, the portion with which we are here concerned being a part of Section 3, which reads as follows:

> Sec. 3. That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws.

Vol. 2 U. S. Compiled Statutes, p. 1393.

Under this section the appellant West had a right to go upon any portion of the unappropriated and unsurveyed public domain, establish his residence thereon, and acquire a prior right to enter the same under the homestead laws of the United States when the said lands should be surveyed and opened to entry by the Government.

In order that a selection by the Railroad Company made subsequent to June 6, 1900, should be such as to withdraw the lands so selected from settlement under the Act of June 6, 1900, the selection must be such as to segregate the lands so selected from the public domain, and give notice to any intending settler of the selection and segregation.

The Act of June 6, 1900, does not require the settler to first determine what the description of the land settled upon by him will be after survey by the Government. It requires no argument to establish the fact that in the very nature of things such a requirement could never be complied with by the settler in a timbered country such as the lands in controversy, and the only segregation which could be reasonably made of such lands so as to give notice to an intending settler, would in the very nature of things, require some notice to be placed upon or adjacent to the lands so attempted to be selected, or by filing in the Local Land Office a selection list containing such a description as would enable an intending settler to definitely locate the lands so sought to be selected with the aid of the description solely. Until such segregation is made, so far as the rights of intending settlers under the act of June 6, 1900, are concerned, the lands are a part of the public domain, which they are lawfully entitled to enter and settle upon. This is now the rule of construction and interpretation adopted by the Honorable Secretary of the Interior and Commissioner of the General Land Office in construing this very Act, that is, the Act of March 2, 1899.

> *Carrie E. Shearer vs. Northern Pacific Railway Company, and Edward Rutledge Timber Company, Intervenor.* Decision of the Commissioner of the General Land Office, dated March 5, 1913.

This rule of construction and interpretation has also been followed by the Honorable Secretary of the Interior and

applied to lieu selections under the act of June 4, 1897, which act does not by its terms prescribe any description whatever for the lands attempted to be selected. That portion of the Act of June 4, 1897, so construed is as follows:

> "That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: Provided further, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

Considering an application to select unsurveyed lands in lieu of lands surrendered in a forest reserve under the above act, the Honorable Commissioner says:

> "The act of 1897, supra, did not supersede said act of May 14, 1880. It did not provide for the withdrawal of such lands from settlement. This could only have been effected under proffers of the character here involved, by marking the land selected upon the ground, or by reference to such natural boundaries or monuments as would have been notice in fact or in law to intending settlers. A reference to lands as what will be, when surveyed, a technical subdivision of a specified section, gives no such notice either in law or in fact. So it results that until the approval of the sur-

vey such settlers had no notice and no means of acquiring information which would have enabled them to avoid conflicts with these selections. It follows that any proof of non-occupancy was valueless. No person could have known in fact that what would be a particular subdivision of the public land when surveyed, was then unoccupied, and the fact that certain portions of this same township had theretofore been surveyed does not, for manifold reasons, weaken this plain conclusion. Upon this question it has not been thought necessary to verify objection of counsel that there were at the time of these selections other proofs of non-occupancy, consisting in part of an affidavit (not now in the record) other than that made by the said Henry W. Bowen, which was on file in still another of the Hyde selections; nor to give any weight to the record fact called specially to the attention of the Department since the oral hearing that the selections themselves show that the complete survey of this township had theretofore been made in the field.

As to the missing affidavit, assuming that it was properly in the record and that it purported all that is claimed for it, still in the view now taken of this case this affidavit proved nothing. The same is true of the recital in the selection itself. It was a coincidence only that the lines of the survey upon the ground and the description given by the selector of these technical subdivisions, were the same which received official recognition by the approval of the township plat. Such was not a necessary result. True, this coincidence was anticipated, but in law the case is the same, as if that field survey had been rejected in its entirety and a new survey made upon other lines.

This being true, it was not possible in law for the Commissioner of the General Land Office to say that sufficient, or any, proof of this question had been presented, or that the selector would upon survey be en-

titled to a patent. That officer erred in so ruling. There was a total absence of jurisdictional facts upon which to base such ruling and the selector took nothing thereby and his assignee is chargeable in law with this lack of jurisdiction and occupies no better position.

The Department has not overlooked the fact and is not disposed to evade the argument that in this view such a selector of unsurveyed land would have no reasonable assurance that he would in any case be able to complete title thereto. But the answer is plain. A person owning land within the limits of a public forest reservation was not bound to relinquish it to the Government. He might still own, hold and enjoy it. He was not bound to accept the invitation extended by that act to make such relinquishment, but when he did so he was bound, not only by the terms of the act but by the limitations upon its benefits imposed by other laws. He might have selected surveyed public lands of the United States, vacant and open to settlement, and upon proof of their non-mineral character and non-occupancy concurrent in time with the selection, he might have completed title thereto without delay; but if he selects unsurveyed lands it is a matter of his own choice and made at his own risk. It may be that the risk might have been reduced to the minimum by such description in making the selections as would have identified the lands as a then present fact, but where such identification was not made the selector necessarily takes the risk of their being or becoming occupied adverse to his selection before the approval of the township plat of survey, which, no matter what may be the application of the doctrine of relation in such cases, is the first identification of such land. Such identification previous to that time was not possible, either by the unofficial protraction of the lines of subsisting public surveys, or by a private survey of any

character. The United States are sovereign and the sovereign makes his own surveys. See *United States v. Montana Lumber & Manufacturing Co.* (196 U. S. 573), and cases therein cited.

The mere fact that the act provides for the selection of vacant land open to settlement is conclusive upon this proposition. If it were not open to settlement, it was not subject to selection; but being subject to selection it was still, unless identified in fact, open to settlement under the act of May 14, 1880, supra, and might be under the provisions of that act appropriated adversely to the selector at any time before the approval of the township plat of survey. Such approval was an identification of the land as of that date, and by relation as against the Government as of the date of the proffers of exchange, but it did not and could not so attach as to cut out intervening adverse settlement claims. This thought receives additional support in the proviso of the act relating to cases of unperfected claims upon the lands relinquished and requiring the laws respecting settlement, residence and improvement, etc., to be complied with on the new claims, credit being allowed for the time spent on the relinquished ones. In cases of this sort the selector could without fear of jeopardizing his selection make it of unsurveyed land, because he would be required to settle, reside upon and improve such unsurveyed land and this residence, settlement and improvement would be notice to the world of his claim which would fully protect him until the filing of the township plat of survey, when he would be permitted to make entry thereof and complete title under the further terms of said act."

F. A. Hyde, et al., Vol. 40 Land Decisions, 284.

Decision of the Commissioner, dated October 6, 1911.

The fact is that both the Commissioner of the General Land Office and the Department of the Interior have, without exception, followed the construction contended for by appellant as to the Act of March 2, 1899, and other kindred acts, in all matters pertaining to lieu selections, with the single exception of the decision in Appellant's case. It is not possible for us to establish this by citing authorities, but if there is a single decision in conflict with our statement here made it will be easy enough for the respondent to produce that decision.

If the intent of the law making body can be ascertained it will be taken into consideration in determining the construction of the statute under consideration, and we believe that it conclusively appears from the language of the Act of March 2, 1899, that Congress intended to require such a description in all lieu selections under this Act as would effectually segregate the lands sought to be selected from the public domain. We believe this because the Act of May 14th, 1880 (21 Statute at Large, p. 140), and commonly known as the Squatters Act, had long been in effect at the time of the passage of this act. Under this Act any person qualified to enter land under the homestead laws of the United States might obtain a preference right of entry by settling upon the unsurveyed public domain.

Now Congress had a short time prior to the enactment of the statute in question, and on July 1, 1898, granted to the Northern Pacific Railroad Company the right to select other lands in lieu of those lost within the place limits by

reason of the same being claimed by settlers, and provided that such lieu selections might be made on unsurveyed lands, in which Act they used the following language: "But all selections of unsurveyed lands shall be of odd numbered sections, to be identified by the survey when made," etc.

Vol. 6 Fed. St. Ann., p. 456.

If Congress had intended to continue to grant to the Railroad Company the right to make lieu selections by simply filing lieu selection lists, describing the lands according to what they might be when surveyed, it is clear they would have continued the use of the language found in the Act of July 1, 1898, above quoted. The fact that Congress has expressly discarded the phraseology employed in the Act of July 1, 1898, and employed language which was so plainly in conflict with the regulations of the Department promulgated under the Act of July 1, 1898, clearly manifests that they could have had no other object or purpose in view than that of annulling the practice theretofore established of permitting the Railroad Company to make lieu selections by describing the lands according to what it would be when the survey was made. In other words, subsequent to July 1, 1898, and prior to or at the time of the passage of the Act of March 2, 1899, Congress must have been informed of the conflicts arising between the settlers and the Railroad Company by reason of the practice of the Railroad Company under the Act of July 1, 1898, and have used the language found in the Act of March 2, 1899, for the express purpose of avoiding any further conflict between the settler and the Railroad Company.

We think the Act of March 2nd, 1899, contemplated this very thing, else, why should the Act provide for two descriptions? One describing the lands "in such manner as to designate the same with a reasonable degree of certainty," etc., before survey, and the other, "A new selection list describing such lands according to such survery," after survey, and the further provision in the last three lines of Section 4 of said Act providing for the changing of the lines of any selection, made before survey, to conform to the official survey.

We are unable to comprehend or understand how any construction can be placed upon the last part of Section 4 of the Act of March 2, 1899, which would not be in direct conflict with the theory that selections might be made under this Act by describing the lands according to what they would be when surveyed. That portion of the Section referred to reads as follows:

> "And within the period of three months after the lands including such tract shall have been surveyed, and the plats thereof filed by said Local Land Office, a new selection list shall be filed by said Company, describing such tract according to such survey, and in case such tract as originally selected and described in the list filed in the Local Land Office, shall not precisely conform with the lines of the official survey, the said Company shall be permitted to describe such tract anew, so as to secure such conformity."

If the description contained in the original selection list was sufficient to describe any land at all it described the identical land contained in the description of the second

selecton list. If the theory of the trial Court and the contention of counsel is correct there could be no necessity for filing the second list.

If the officials of the Railway Company should conclude that there might be lands which would be described in a certain way under some future survey which might be made, and which lands might be valuable for their timber products, and that, without ever seeing or going upon the land or doing anything whatsoever which might impart notice to the settler that it desired any particular land, and should cause a general blanket selection list to be filed in the Land Department at Washington in which they might describe all land that might ever thereafter be surveyed, even then there could never be a necessity for filing a second selection list covering the same land.

The learned trial Court in passing upon this question said:

> "By the plaintiff much significance is attached to the clause in the latter part of the act, which provides that, 'In case such tract (of unsurveyed land) as originally selected and described in the list filed in the local land office shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity.' It is urged that such a method as was followed here admits of no variation or discrepancy requiring adjustment. The argument rests wholly upon the assumption that if the method is authorized at all, it is exclusive; but such an assumption is plainly unwarranted. The Act does not purport to require any given form of description, but upon the other

> hand gives the widest latitude; its only requirement is that in the selection list the lands shall be designated with 'reasonable degree of certainty'; the method of designation is immaterial provided it identifies the land. It was doubtless anticipated that different methods would be employed, and the provision above quoted was intended to point out the course to be pursued in cases where the original description is not tied to the lines of an official survey, as here."

It seems to us that the trial Court has here overlooked the most important thing to be considered concerning this question; that is, it was the intention of Congress to exclude this particular method because it had theretofore been tried and found unsuccessful.

It seems to us that the conclusion is inevitable, even under the ordinary rule of construction, and when we take into consideration the rule which requires that public grants shall be strictly construed against the grantee and in favor of the grantor, and that nothing passes but what is conveyed in clear and explicit language, there ought to be no doubt as to how the statute in question should be construed. Again the learned trial Court recognized this rule but evaded it, saying:

> "Much stress is laid upon the familiar rule that public grants are construed strictly against the grantee. In applying this rule, however, some consideration should be given to the fact that the grant here was not a mere gratuity, but that the act is in the nature of an offer upon the part of the Government of an exchange of lands presumably beneficial to it. Besides, the question in controversy relates not to the extent of the grant, but only to procedure in the

> administration of the act, a subject which is left largely to regulation by the land department."

The fact still remains, however, that the Act of March 2, 1899, is a grant in fact, granting to the Railroad Company the right, at its option, to surrender its right to a worthless mountain range and accept in lieu the right to select from among the surveyed or unsurveyed public lands of the United States the choicest and richest part thereof. The Honorable Commissioner of the General Land Office has so construed this very Act.

> *Northern Pacific Railway Company,* 40 L. D., p. 441.

In discussing the rule of construction above mentioned the United States Supreme Court says:

> "The reason of the above rule is obvious—parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently explicit and clear to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking, by ingenious interpretations and insinuation, that which cannot be obtained by plain and express terms."

> *Dubuque & Pacific R. R. Co. vs. Litchfield,* 64 U. S. 16, L. Ed. 509.

> *Charles River Bridge vs. Warren Bridge,* 11 Pet. 420.

Barden vs. N. P. R., 38 L. Ed. 992-991, 154 U. S. 312.

Cornell vs. Coyne, 192 U. S. 432, B. 48 L. Ed. 509.

"But if there be any doubt as to the proper construction of this statute—and we think there is none —then that construction must be adopted which is most advantageous to the interests of the government."

Hannibal & St. Joseph R. Co. vs. Missouri River Packet Co., 125 U. S. 260; 8 Sup. Ct. 874; 31 L. Ed. 731.

Story vs. Wolverton, et al, 78 Pac. 590.

We cannot help but believe that the hand of the Railroad Company is seen in the drafting of this bill, for the reason that while the Railroad Company is given the right to select from the surveyed and unsurveyed public lands of the United States, the settler upon the lands sought to be set aside as the Mount Rainier National Park is granted in lieu of his rights the right to select only surveyed lands. The Act in question to this very material extent prefers the Railroad Company over the settler. Under these conditions and circumstances we do not believe that the aid and encouragement of the Courts ought to be given in further extending these rights of preference by construction of the Act in question, in favor of the grantee who has thus sought and obtained an advantage over the settler who surrenders equal rights with such grantee. We refer to section 3 of the Act of March 2, 1899, which reads as follows:

"Sec. 3. That upon execution and filing with the

Secretary of the Interior, by the Northern Pacific Railroad Company, of proper deed releasing and conveying to the United States the lands in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said Company, whether surveyed or unsurveyed, and which lie opposite said company's constructed road, said company is hereby authorized to select an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual Government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States: Provided, that any settlers on lands in said National Park may relinquish their rights thereto and take other public lands in lieu thereof, to the same extent and under the same limitations and conditions as are provided by law for forest reserves and national parks."

Vol. 30 U. S. St. L., p. 994.

The lands in controversy were originally owned by the Government. In making disposition thereof Congress, acting for the Government, was providing the manner of disposing of said lands in a governmental capacity. Many conflicts had arisen between the settlers and the railroads as to who had the first rights under selections and settlements. The courts had been and were called upon to determine these conflicts.

On July 1, 1898, Congress passed a lieu selection act. In

that act it was provided that lieu selections might be made of any unsurveyed lands "to be identified by the survey when made." This act was for the protection of the railroad company by reason of the loss of large areas of its land which had been given it under its grant, by reason of portions thereof having been entered and settled upon by settlers under the laws of the United States.

In less than two years and on March 2, 1899, the act involved at bar was passed. In that act it was provided that if selections were made of unsurveyed land that the selection list should be filed "at the local land office," and not in the General Land Office at Washington; it further provided that the lands sought to be selected should be described "in such manner as to designate the same with a reasonable degree of certainty."

It cannot be said that Congress made such radical changes and provisions in the later act from those contained in the former without any thought or purpose. All of the provisions which were changed were for the benefit of the settler. If the provisions of the later act were complied with no settler could complain. If the selection list was filed in the local land office the settler would have an opportunity to know of its existence, examine it and determine, if it was possible so to do from its contents, what land was sought to be selected. At bar the evidence shows that investigation and inquiry was made at the local land office and that nothing could be found of record imparting any notice as to these selection lists.

What is the clear meaning of the provision that the land

shall be described "in such manner as to designate the same with a reasonable degree of certainty"? In the case at bar it is shown that the closest surveyed line to this land is the south line of the township adjoining on the north. Sections one to eighteen, inclusive, constitute the first three miles on the north line of said township. The southeast quarter (SE¼) of Section Twenty (20), in controversy here, is three miles and a half from that surveyed line. It is in rough, mountainous, heavily timbered country. A man who had sufficient means with which to employ surveyors to run out the lines and determine what this tract of land would be when surveyed is not the man that would ever become the settler. In fact it is and would have been a physical impossibility for any person, other than the U. S. Government, to have ascertained what this particular tract of land would be when surveyed.

If the railway company had been doing as the settler, going into the heart of the country which was unsurveyed, making examinations and determining what, if any land, it desired to take, it could have, by reference to Marble Creek or some mountain peak or some other object or monument, natural or artificial, designated such land with a reasonable degree of certainty. Lines could have been blazed, corners could have been marked and it could have acted in the same manner that the settler is required to and does act. It was not and is not entitled to any more consideration at the hands of the Court than is the pioneer who takes his blankets and provisions on hsr back and goes into the heart of the unsettled country for the purpose of establishing and providing for himself a home. A settler does

not attempt to obtain or procure any rights except those that he takes possession of and occupies and which he plainly marks so that any subsequent claimant may be able to ascertain that the land is occupied. This condition is the very condition Congress was meeting. It did not desire to continue the law and the rule which provided for the identification of lands after they were surveyed. It was the intention of Congress that the land should be so described that it would be reasonably designated in fact.

The contemporaneous history of this legislation as manifested by the plain provisions of the acts, is amply sufficient to show the clear intention of Congress to provide a means by which a designation of the lands as a matter of fact would protect the settler so that he would not go on unoccupied lands and devote a number of the best years of his life in establishing a home and to then have it taken away from him.

It was well known to Congress that the land could not be described so as to designate it by legal subdivisions of sections, townships and ranges. It was also well known that such designation could only be made by tying or reference to natural or artificial monuments and objects, or by blazing and marking. With that knowledge in its possession it was provided in the act that the land should be designated with a reasonable degree of certainty and the only possible way that could be done was by the reference or tying to the natural or artificial monuments and objects and by blazing and markings. To the end and for the purpose of doing that which would not be unfair to the railroad

company it was provided in the act that if its lines based upon the references and tying to such natural or artificial objects and monuments or to such blazings and markings, do not conform to the lines which may at some subsequent time be fixed by the United States Government survey, the description may be corrected by the filing of a new list so as to make such lines conform to the survey.

Again, unless the language of the Act is such as to clearly prohibit it, the Act involved in the case at bar should be so construed as to give equal rights and opportunities to both the prospective settler and the Railway Company in the matter of acquiring the unsurveyed lands of the United States. The construction placed upon this Act by the trial Court gives to the Company much greater rights and privileges than is left to the settler.

Commencing at a time long prior to the passage of the Act of March 2, 1899, and extending down to the present time, the settler upon the unsurveyed public land has been required by the Land Department to segregate any land attempted to be claimed by him by marking the boundaries thereof upon the ground in such a manner that there could be no mistake as to the identity of the lands claimed by him. The Act of March 2, 1899, is not only susceptible of such a construction, but we think clearly requires it. In any event, we submit that it is the duty of the Court to so construe this Act that equal rights will be granted to all, and special privileges to none. To do otherwise is to say to Congress that in the passage of the Act of March 2, 1899, they intended to grant special privileges to the Railroad

Company over the settler. We would like to believe that no such intention ever existed, not for the sake of the result in this case, but for the sake of posterity.

The official records of the United States, of which the court must take judicial knowledge, furnish another cogent and irresistible reason why the description contained in the original selection list was insufficient. A number of sections and parts of sections are described, giving the number of acres, which aggregated 3920 acres, according to the selection list. All of the numbers of acres set forth in said selection list are based upon the theory that each section contains 640 acres. It is well known that the north, west and south tier of sections never contain the exact acreage contained in the interior sections. (Tr., p. 51).

From the official survey of the lands described in the selection list which was attempted to be selected, it appears that the west half of section 6 contained 282.03 acres instead of the 320 acres as shown in the list. That the northeast quarter of the southwest quarter and the south half of the southwest quarter of section 30 contained 115.13 acres as against 120 shown in the list. Necessarily the west half of section 6 being so much different when actually surveyed from the amount shown in the list the west half of sections 7, 18, 19, 30 and 31 would show practically the same discrepancy.

The act provides that equal quantities of land must be released and accepted. The very facts contained in this survey show, beyond peradventure of a doubt, that it

was and is a physical impossibility to come within the provisions of this act by attempting to describe the lands as to what they will be when surveyed.

Directing attention again to a part of the public records of the United States, of which the court must take judicial knowledge, we find that all of the land in sections 1 to 24 of township 12, South Range 4, East W. M., according to the official survey of December 22, 1913, was first surveyed in 1905 and 1906; that that survey was not investigated until January, 1911, at which time the survey was rejected. In June, 1911, a new survey was ordered which was actually made on the ground in 1912. On October 29, 1913, the plat of the second survey was filed in the land office and was approved on December 22, 1913. There were variances between the lines of the first and second surveys of from 40 to 60 rods. There were variances in the quantity of land contained in some quarter sections of almost a hundred acres, in some instances more and in some less than appeared in the first survey.

The variance of 40 rods across a section is 80 acres. Could it have been possible for any surveyors or engineers, however competent, to have gone upon these lands, discovered and marked out the boundaries thereof under the description contained in the selection list filed by the railway company, wherein the lands were referred to as to what they would be when surveyed. The official surveyors of the United States Government were unable so to do until, acting under direction of the land department, they had made a second survey.

In discussing this question the learned trial court made use of language which appears to us to show that he failed to consider this part of the case in its true light. We refer to the following, after stating that he believed the description used by the Railway Company in its selection list was sufficient, "but however that may be in this particular instance, it is apparent that unless the view be adopted, that, as a matter of law, under no conditions can a description by reference to the lines of the official survey be held to be in compliance with the Act, the question of the sufficiency of the description is in every case one of fact, and hence not subject to review by the courts, and I am wholly unable to assent to the proposition that such a description can under no circumstances be held to be reasonably certain."

In the case at bar there was no room for any disputed question of fact. The respondent Railway Company filed its purported lieu selection list No. 61, purporting to cover the lands in question. Appellant West made application to enter the lands in question under the homestead laws of the United States. His application was rejected, "because in conflict with lieu selection list No. 61 theretofore filed by the Northern Pacific Railway Company." West appealed, contending that the selection by the Railway Company was void because they had failed to comply with the law. No testimony was ever taken, no evidence was ever introduced, nor in the natuure of things could there have been any evidence considered; no hearing was ever ordered, and under the circumstances it would have been improper

for the officers of the Land Department to consider any evidence.

The courts have universally held that where the facts are all admitted or undisputed, that what is "reasonable" within the meaning of any given statute is a question of law for the courts.

> "Whether the regulation of a Railroad Company, separating white and colored people and providing separate cars for each race was a reasonable one or not the facts being admitted, is a question of law for the Court."
>
> *Chilton vs. St. L. & Iron Mt. R. Co.,* 19 L. R. A. 269.

> "The construction of a written contract where no extrinsic evidence is necessary to explain its terms and also of an oral contract where its terms are admitted is a question of law for the Court."
>
> *9 Cyc. 591.*
>
> *Dennis vs. Natl. Bank,* 38 Wash. 439, 80 Pac. 764.

> "What is a resonable time to object to items of an account rendered, the dates being clear, is a question of law."
>
> *Fleischner vs. Kubli,* 25 Pac. 1089.
>
> *Standard Oil Co. vs. Van Etten,* 107 U. S. 333-334. 27 Law. Ed. 322.

> "A police regulation must not extend beyond that

reasonable interference which tends to preserve and promote enjoyment generally of those inalienable rights with which all men are endowed, etc. * * * and that whether an act purporting to be within the field of police power is reasonable or not, in the ultimate is a judicial question."

Bonnett vs. Vallier, 116 N. W. 885, 17 L. R. A. N. S. 486-491.

State vs. Redmon, 114 N. W. 137; 14 L. R. A. N. S. 229.

This being true there is no doubt concerning the rights of the Court to review the action of the officers of the Land Department in this case.

This being true there is no doubt concerning the rights of the Court to review the action of the officers of the Land Department in this case.

"Where there is a mixed question of law and of fact, and the Court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive. But if it can be made entirely plain to a court of equity that, on facts about which there is no dispute or reasonable doubt, the officers of the Land Department have, by a mistake of law, deprived a man of his right, it will give relief."

Marquez vs. Frisbie, 101 U. S. 473. B. 25 Law. Ed. 800.

Whitcomb vs. White, 214 U. S. 17; Book 53 L. Ed. 891.

We have also assigned as error, that the Court erred in holding and deciding that the Northern Pacific Railway Company had the right to exercise the rights of the Northern Pacific Railroad Company under this grant. We do not desire to argue this matter as a separate and independent assignment of error, but we think this much will be conceded. That the Northern Pacific Railway Company can exercise no rights in the premises except it be by the grace of the Court granted in this case through an exceedingly liberal construction, not only of the language of the grant, and as to the intention of Congress in passing the Act in question, but as to the records of the Land Department, as well.

Where the equities of the case are so strongly with one of the parties as they are with the appellant in the case at bar, equity requires that the respondent shall be held to the strict letter of the law, and nothing will be permitted to be gained by it by construction. In other words where a liberal construction would result in depriving one of that which in equity he ought to have, then the rule of liberal construction will be withheld and a rule of strict construction adopted in order that injustice may not be done.

Public policy also requires that the rule of strict constructions against the railway company under the grant contained in this act should prevail. The courts have adopted that rule and it is wholesome. To make a change in that rule now is to say that there are thousands of settlers upon the public domain of the United States who have in good faith as patriotic citizens, believing in the justice

and fair dealing of their government, gone upon unmarked unoccupied land and established a home. They have suffered the hardships of the pioneer. They are the persons who have been for years and are now extending the line of improvement and civilization. They are the persons who are furnishing and will continue to furnish the tonnage for this railway which is claiming the right to take from them their homes and labor.

During a recent period of years a great spirit of unrest has arisen in this country. As year by year the wealth of the country has been more and more centralized in the hands of a few persons who own these railroads and big lumber corporations, the people have been brought to realize that their rights must be defended strenuously against that wealth and these few men. If the courts do not protect the rights of these people along the lines of provisions of the acts of congress they have no rights. Whatever may be said as to any suggestion made which would seem to be made for the purpose of creating a prejudice against these big corporations the fact still remains that each and all of these corporations will and do demand the last pound. The men who are employed to manage and control the business of the corporation for its stockholders have but one purpose, that to obtain results and money for the stockholders.

In the case at bar, while the men who will benefit by obtaining this property if the decision of the trial Court is affirmed, were living in ease and luxury in the pleasure resorts of this and other countries, the appellant and all of the settlers who are pioneering in the great western coun-

try were suffering hardships which must be undergone in building homes in the unoccupied portions of the United States. They, of necessity, have but a scanty living and the pleasures of life are impossible to them. There can not be a single doubt as to the truth of these conditions. They furnish ample reason for the court to construe the statutes strictly against the strong and powerful corporations in which the wealth of the country is centralized.

We make this contention for the reason that if there were no precedents, such strict construction should be given. This rule, however, is not without precedent.

Furthermore, the construction which we say should be given to the plain language of the Act of May 2, 1899, is not unreasonable but is in entire harmony with the plain import of the language of the act. We say that there is not a person living who could take the description contained in the original selection list in this act and determine where the land therein sought to be described was situated, prior to the time when the government had caused said land to be surveyed and had approved the survey.

We are not asking the Court to make any law. We are simply asking that the law which has been enacted by Congress be fairly construed.

It therefore follows that the decree of the Trial Court should be reversed.

Respectfully submitted,

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